FEB 17 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

Number 1053

MRS. FRANCIS FAIRCLOTH, and RUEL FAIRCLOTH,
Petitioner,

versus

JAMES FLETCHER HESTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

L. B. KENT
311 Columbus Bank and
Trust Company
Columbus, Georgia

INDEX

Page No.

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statutes Involved 2

Statement 3

Facts 3

Reasons for Granting this Writ 4

Conclusion 8

Certificate 9

Appendix 10

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1968

No.

MRS. FRANCIS FAIRCLOTH, and RUEL FAIRCLOTH,
Petitioner,

versus

JAMES FLETCHER HESTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Francis Faircloth, and Ruel Faircloth, Petitioners, herein pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 8, 1969.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is unreported and is printed in

Appendix A hereto, infra; page 10 . The judgment of the United States District Court of Georgia, Columbus Division, is printed in the record at page 315.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 8, 1969 (infra, appendix A, page 10.) The jurisdiction of the Court is invoked under 28 USC Section 1254(1).

QUESTION PRESENTED

Is the driver who has volunteered to take his passenger to Columbus, Georgia and to return to Chattahoochee, Florida for the gasoline it takes to make the trip, the agent of the passenger and will his negligence be imputed to the passenger, where the passenger is the one who tells the driver that she has to leave Columbus at a certain time and the driver happens to be the fiancee of the passengers daughter. Does this make the driver her agent and his negligence to be imputed to her in a suit by the passenger against a third party, under Georgia law?

STATUTES INVOLVED

Ga. Code (1933) Section 4-101 "The relation of principal and agent arises whenever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf."

Ga. Code (1933) Section 105-205 "For the negligence of one person to be properly imputable to another, the one to whom it is imputed must stand in such a relation or privity to the negligent person as to create the relation of principal and agent. In a suit by an infant, the fault of the parent, or of custodians selected by the parents, is not imputable to the child."

STATEMENT

Basis of Jurisdiction in the District Court, Middle District, Georgia, Columbus, Division.

Jurisdiction in the District Court was founded on Diversity of Citizenship, Title 28, United States Code.

FACTS

On June 21, 1965, at 3:00 p.m., in Lumpkin, Georgia, Francis Faircloth was injured in a wreck between the automobile, which she was riding in and the automobile of the defendant, James Fletcher Hester. Faircloth was riding in an automobile driven by David Sullivan. David Sullivan had volunteered to take Francis Faircloth from Chattahoochee, Florida to Columbus, Georgia and return for the purchase of the gasoline it takes to make the trip. Francis Faircloth told David Sullivan when she wished to leave Columbus, Georgia and return to Chattahoochee, Florida and she testified that she guessed he was driving for her. The case was tried and the Court

submitted to the jury the question whether the driver was her agent and if so, the negligence could be imputed to the passenger. A verdict was returned for the defendant. The judgment was appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals sustained the judgment.

REASONS FOR GRANTING THIS WRIT

This petition for a writ of certiorari to the Fifth Circuit Court of Appeals should be granted for the following reasons:

I. The decision of the Court of Appeals in Francis and Ruel Faircloth v. James Fletcher Hester (Appendix P. 10) is in conflict with the decisions of the Court of Appeals and Supreme Court of Georgia on the question of imputed negligence to the passenger of an automobile. The court allowed the jury to determine that the driver was agent of the passenger and that the drivers negligence could be imputed to the passenger based upon the fact that the driver was the fiancee of the passengers daughter, that he was told that they had to go to Columbus, Georgia and return to Chattahoochee, Florida which he knew at the time that he volunteered to take the passenger to Columbus, Georgia and the fact that the passenger purchased the gasoline.

This is in direct conflict with the Georgia law.

II. "Where the share the expense riding in a motor vehicle is prearranged by a legally enforcable agreement, such a situation makes the passenger a passenger for hire and not a guest, and requires ordinary care on the part of the operator of the motor vehicle." *FOUNTAIN v. TIDWELL,* 92 Ga. App. 199 (1955).

III. 'Where a defendant proposes to a plaintiff that if plaintiff would buy some beer for the defendant, the defendant would provide plaintiff with a ride to a certain point and the plaintiff accepts said offer and purchases the beer for the defendant, the plaintiff becomes a passenger for hire in the car of the defendant on a ride to the agreed designation." *VARGA v. WILLIAMSON,* 110 Ga. App. 684.

IV. Any agreement for the payment of compensation for transportation which is shown to have been executed in whole or in part would be sufficient to change the relationship of the parties from that of mere host and invited guest and to charge the driver with the duty of exercising a greater degree of care then is imposed upon a gratutitious host. The passenger Hogan paid $1.00 on the gasoline for a trip from August, Georgia to Atlanta and return. Court held: passenger for hire: negligence not imputable. *SALLEY v. HOGAN,* 104 Ga. App. 876.

V. The plaintiff (land owner) sued adjoining defendant (land owner) for personal property and damages as a result of a fire being caused by the defendants financee

who was cleaning defendants place; the fire occurred two days before wedding of defendant and fiancee. Court held: evidence insufficient to show the relationship of principal and agent, between the defendant and his fiancee's negligence so as to charge the defendant with his negligence in the burning of the plaintiffs property. *BASINGER v. HUFF,* 98 Ga. App. 288.

VI. A driver of a taxi cab is not the agent of the passenger, nor is his negligence imputable to the passenger notwithstanding the passenger dictates where to go and when to go. *EAST TENNESSEE, Va. and Ga. RAILWAY COMPANY v. MARKENS,* 88 Ga. App. 60; *METROPOLITAN RAILROAD COMPANY v. POWELL,* 89 Ga. 601.

VII. Passengers, (husbands and wives), one couple owning the automobile and the other couple paying for gasoline and tires and repairs and to assist in the driving; a collision taking place during the progress of the trip, and injuring the passengers, court held that the evidence demanded the status of the passengers to be passengers for hire and that the negligence of the driver was not imputable to the passengers. *OWENS v. WHITE,* 103 Ga. App. 459.

The facts in Faircloth v. James Fletcher Hester case demands that the negligence of the driver is not to be imputed to the passenger and that the passenger be classified as a passenger for hire.

In the Fifth Circuit Court of Appeals opinion, the court cites *CORONET v. MCWATERS,* 101 Ga. App. 120; this case is one where the minor is the driver and the mother is the passenger. In Georgia by decision and statute the control of the minor vest in the parents. Consequently the negligence of the minor could be imputed to the parents since the parent has control.

The court further used the case of *WARNER v. ELLIOT,* 96 Ga. App. 778 and [redacted] involved an agents authority to control employees and operate a saw mill on a holiday, thereby causing damages. The question was whether the agent had authority to operate and if he committed any negligence. A motion for non-suit was made after plaintiffs evidence had been presented. The court held that if there was any evidence of agents authority and negligence it should have been submitted to the jury.

The facts in the Faircloth case is not in conflict or in dispute. It is a simple question of whether the jury should have been charged to the effect that the drivers negligence was not imputed to the passenger.

The facts demand that the negligence of the driver be not imputed to the passenger as a matter of law. It was requested.

The opinion of the Fifth Circuit Court of Appeals has set the law of Georgia back one hundred years on imputed negligence. Ever since the codification of a

Georgia Code from the case of *EAST TENNESSEE RAILWAY COMPANY v. MARKENS*, 88 Ga. 60.

The issue presented in this petition is of great importance in that two lines of decisions has been overruled in Georgia by the Fifth Circuits opinion.

1. The passenger for hire decisions.
2. The imputed negligence decisions.

The Fifth Circuit Court of Appeals decisions [redacted]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

L.B. Kent,
Counsel For Petitioner

Counsel of Record
311 Columbus Bank and Trust Company
Columbus, Georgia

Date

CERTIFICATE

I DO HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari has been furnished by mail to opposing counsel of record this day of January, 1969.

L. B. [redacted]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26390

MRS. FRANCES FAIRCLOTH and RUEL FAIRCLOTH,
Appellants,

versus

JAMES FLETCHER HESTER,
Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(December 19, 1968)

Before BELL and COLEMAN, Circuit Judges
and BOYLE, District Judge.

PER CURIAM: This appeal from a judgment in an automobile collision diversity case raises two questions as to the District Court's charge to the jury. The first question is whether the evidence warranted submission to the jury of the issue whether the driver of the car in which appellant was riding, Sullivan, was appellant's agent. If the jury could have found agency, then a verdict premised on imputed negligence and comparative negligence was not out of order. In *Warner v. Elliott,* 96 Ga. App. 778, 789, 101 S. Ed. 2d 591

(1957), the Georgia Court of Appeals said: "If there is any evidence tending to establish the agency, the questions should be submitted to the jury." The evidence indicates that Sullivan was a friend of appellant's daughter. He agreed to drive appellant from

Chattahooche, Florida to Columbus, Georgia and return. Appellant told Sullivan where to go, when to leave, when to start back, and purchased the gasoline for the trip. This was sufficient evidence for the submission of the agency question to the jury. Cf. *Cornett v.McWaters,* 101 Ga. App. 120, 122, 112 S. E. 2d 797 (1960).

The second question concerns possible confusion or prejudice that might have resulted from the charge as to burden of proof. Our view is that the charge when read as a whole is in no way confusing or prejudicial.

AFFIRMED.